Supreme Court, U.S.
FILED
SEP 30 1991
OFFICE OF THE CLERK

No. 91-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF ZION, et al.,

Petitioners,

v.

CLINT W. HARRIS, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The Respondent contends that the petition for writ of certiorari should be denied for the following reasons: (1) the Petitioners' version of the facts with respect to standing is false; (2) the Petitioners waived the factual questions as to the Respondent's claim to standing; (3) the City of Zion's current purpose in displaying its seal, emblem and logo is not historical or commemorative, but to promote the Christian Catholic Church; (4) the City of Zion's seal, emblem and logo are coercive; and (5) the adjudication of this case on the merits would give little guidance to other lawsuits because of its unique factual situation.

In reply, the Petitioner states that the reasons stated by the Respondent are not supported by the Record or sound legal reasoning.

I.

The Petitioners' version of the facts with respect to standing is supported by the Record and true.

The following facts with respect to standing are set forth in the petition for writ of certiorari (p. 7-8):

> A. In March, 1986, Robert Sherman, an atheist who resides in Buffalo Grove, Illinois, saw Zion's logo on the city's water tower as he was driving by it (Sherman Dep., p. 6, 30, 36-37).
>
> B. Between March, 1986 and July, 1987, Sherman talked with several people about being a potential plaintiff in a lawsuit against Zion which would challenge the symbols now at issue. They all declined (Sherman Dep., p. 47-50).
>
> C. Sherman also brought Zion's symbols to the public's attention in radio, television and newspaper interviews hoping to attract the attention of a Zion

resident who would want to seek recourse against the city (Sherman Dep., p. 50-51).

D. In early 1987, Sherman met Clint W. Harris through a local chapter of the American Atheists. Harris joined the American Atheists in May, 1987 (Harris Interrog. Resp. No. 5).

E. During the May, 1987 chapter meeting of the American Atheists which Harris attended, Sherman discussed Zion and its symbols (Sherman Dep., p. 58).

F. During the first week of July, 1987, Sherman took Harris through Zion. They spent approximately two hours there (Sherman Dep., p. 46).

G. Within the week, on July 7, 1987, Harris moved to Zion (Harris Interrog. Resp. No. 9(a); Sherman Dep., p. 59). Harris rented a room in a "dorm-like" building in Zion on a weekly basis. His room was for sleeping purposes only (Harris Dep., p. 17, 21-22).

H. This lawsuit was filed approximately one month later. Prior to the suit's being filed, Harris spoke to no attorneys and he never saw the Complaint (Harris Dep., p. 61-62).

The Respondent has never disputed any of these facts and does not dispute them now. These facts support the observation made by Judge Easterbrook in his dissent, namely: "This looks like a put-up job distinct from the claim in *St. Charles* and *Crestwood* that longtime residents had been compelled by religious scruples to change the pattern of their lives." App. 34a. Judge Easterbrook also noted that, "Harris related in his deposition that he had been recruited by the Society of Separationists as a potential plaintiff (apparently none of the existing residents of the city objected to the seal). He moved to a boarding house within the city's limits and lent his name to the litigation." App. 34a.

Further, in their dissent to the denial of the petition for rehearing in banc, Judges Cudahy and Manion stated: "The Zion Seal has been part of that city's nearly 100-year history, and has always been so regarded (with affection and pride) until the plaintiff's claim of harm implausibly conjured up the First Amendment. Again, the claim of injury seems not only too farfetched to win 'case or controversy' status but actually appears manufactured for the purposes of litigation only." App. 51a.

The only fact that is disputed by the Respondent is whether he was required to display, on the windshield of his automobile, the City's vehicle sticker containing the design of the seal. The Respondent contends that Zion police officers had stopped him, given him a ticket for not displaying a vehicle sticker on his car, and forced him to purchase a vehicle sticker. However, there is no support in the Record for his contention. The Record does not contain a copy of the ticket supposedly given to the Respondent. The Respondent made no such allegation in his Third Amended Complaint (R. Doc. 42, par. 5). The Respondent made no such statement in his affidavit (R. Doc. 61, Harris Aff.) or in his deposition (R. Doc. 68, Harris Dep.). The Respondent made no mention of being given a ticket for not displaying a vehicle sticker on his car in his Statement of Material Facts. (R. Doc. 61). In fact, the Respondent made this contention for the first time in his brief in opposition to the petition for writ of certiorari.

To support his contention, the Respondent refers only to a page from Sherman's deposition (R. Doc. 68, Sherman Dep. 59) and a copy of a vehicle sticker application (Appendix D, 5ra). In his deposition taken on July 25, 1988, Sherman states: "Clint called me on the phone and he was very angry. He said that on June 13, just six days after he moved into Zion, he was doing some photography

near or at city hall and that several police officers stopped him and had issued to him a ticket for not having purchased a vehicle sticker for his friend's car which he was using." It goes without saying that this statement is hearsay and not admissible. The Respondent did not so testify in his deposition or make such a statement in his affidavit. Moreover, the Respondent could not be required to have a vehicle sticker for someone else's car. If a ticket were issued, it would have to be issued to the person who owned the car. Since the Respondent did not place a copy of the ticket in the Record, it cannot be ascertained whether a ticket was actually given to him as he now contends and, if so, to whom it was issued.

The vehicle sticker application is dated July 17, 1987. It is in the name of Clint Harris and Isadore Adams and contains only a blank space where the owner's driver's license number should have appeared. In his deposition taken nearly ten months later on May 24, 1988, the Respondent admitted that he did not own an automobile and did not currently have a car in Zion. He stated that his father was going to give him a car, but he did not know when (Harris Dep., p. 95-96).

The Record does not identify Isadore Adams. It can only be surmised that the Respondent placed Isadore Adams' name on the application because Adams was the owner of the car described in the application, namely, a 1976 Toyota Corolla. If a vehicle sticker had to be purchased, Adams (not Harris) would be the person required to purchase it. In any event, the Respondent could not be forced to purchase a city vehicle sticker for a car which did not belong to him. Under the circumstances, he must be deemed to have done so gratuitously and not under any coercion.

II.

The Petitioners have not waived any factual question with respect to the Respondent's claim to standing.

As pointed out above, all of the facts regarding the Respondent's being a transient plaintiff who was recruited for the litigation are undisputed. The Respondent now contends for the first time that he was given a ticket for not displaying a vehicle sticker on his automobile. The contention is completely unsupported by the Record. However, assuming, *arguendo*, that it were supported by the Record, it does not contravene the undisputed facts showing that the Respondent is a transient plaintiff and was recruited for the litigation. The issue here is the legal sufficiency of the Respondent's claim to standing and the Respondent acknowledges that the legal sufficiency of a plaintiff's claim to standing can be considered by this Court whether or not the defendant raised it below (Respondent's brief, p. 7).

III.

The City of Zion's current purpose in displaying the seal, emblem and logo is to commemorate the City's historical origins and not to promote the Christian Catholic Church.

Referring to the Minutes of Zion's first City Council meeting on May 6, 1902 and the words of the Reverend Alexander Dowie, the Respondent points out that the original legislative purpose of the Zion seal was expressly religious. However, Reverend Dowie's words and the City Council's action took place nearly ninety years ago and much has changed since then. Zion is now a mainstream U.S.A. community. The original theocracy disappeared over fifty years ago and Zion has become a typical American community in politics and government.

The Respondent asserts that the City Council's action on May 20, 1986 to retain the seal in its current form for historical reasons is irrelevant because it was done in response to Robert Sherman's public statements challenging the legality of the seal and was articulated by the City attorney, rather than one of the Council members. However, it does not matter whether the legislative purpose was articulated by the City attorney, or that it was in response to statements made by Mr. Sherman. What does matter is that the current legislative purpose, as stated at the time of the vote, was secular and that there is no evidence of its being a sham and not sincere. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

Also, under Illinois law, the City Council, whose membership is subject to change with each election, has the right to modify the seal at any time. *Ill.Rev.Stat.*, Ch. 24, Section 2-3-8 (1989). It is not bound to retain a seal adopted in 1902. The fact that it has freely chosen to do so implies a current legislative purpose in keeping with the City of Zion as it exists today.

The original purpose of a government's use of a symbol has little relevance in an analysis of whether its current use has a secular purpose. In *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), the court ruled:

> The AJC, in arguing that the purpose of the City Hall nativity scene was to promote Christianity, points out that in October, 1959, Mayor Daley said of the scene, 'We are a Christian Nation. I think the more religion we can get in politics, the better off we are.' This comment, although perhaps relevant to the original purpose of the nativity scene, reveals little about the purpose behind the 1985-88 display.

This is particularly true here, where over ninety years have passed since Reverend Dowie presented the seal at the first meeting of the City Council in 1902.

In addition, the Respondent contends that the Zion banner continues to be the logo of the Christian Catholic Church. The Record does not support that contention. On page 2 of the Respondent's brief, he states that Appendix A (1ra) contains a picture of the Christian Catholic Church's Zion Banner in the September 1, 1990 issue of the Leaves of Healing, the official publication of the Christian Catholic Church. The September 1, 1990 date is incorrect and should be deemed a typographical error. Appendix A (1ra) purports to display the Zion Banner as it existed in the year *1900*. The Record shows that the Zion banner has been displayed by the Christian Catholic Church on only one occasion in modern times, namely, the March-April, 1987 issue of the Leaves of Healing (Appendix B, 2ra).

In his affidavit, the current pastor of the Christian Catholic Church, Roger W. Ottersen, states that neither the City of Zion seal nor the shield-shaped design in the center of the seal is or has ever been a part of the seal of the Christian Catholic Church (R. Doc. 74, Ottersen Aff.). The so-called Zion banner is not currently the logo of the Christian Catholic Church. It does not appear on the letterhead of the Christian Catholic Church or its brochure. The church's logo is an arch under which appears a cross, both of which are placed on an open book and under which appears the phrase, "Building on the Word" (R. Doc. 74).

Today, Zion boasts over thirty places of worship, including a Muslim temple. (R. Doc. 68, Geo-Karis Aff. par. 15). Yet no long-time resident of Zion has objected to the City's seal, emblem and logo as promoting the Christian Catholic Church.

IV.

The City of Zion's seal, emblem and logo are not coercive.

The Respondent argues that the City of Zion's seal, emblem and logo are directly and indirectly coercive—directly, because the Respondent was required to place on his car a vehicle sticker containing the design of the seal, and indirectly, because of the seal's close identification with the City government and its pervasiveness.

As pointed out above, the Respondent did not own a car and was not required to purchase or display a city vehicle sticker. His application for a city vehicle sticker (Exhibit D, 5ra) was a gratuitous act because the car for which he applied for the city vehicle sticker was owned by another person. The Respondent, in his deposition, admitted that he did not own an automobile and did not currently have a car in Zion (Harris Dep. p. 95-96). Moreover, as stated in the petition for certiorari at page 26, non-adherents who object to religious imagery may cut it out or cover it up. *Wooley v. Maynard*, 430 U.S. 705 (1977). Very simply, Harris was never subject to any direct coercion.

A city seal is closely identified with the city government. However, our coins and currency, which contain the "eye of God" on the Great Seal of the United States and the words "In God We Trust", are also closely identified with the federal government. The religious imagery on the City of Zion's seal is no more pervasive than the religious imagery on our coins and currency. What is pervasive in our great nation, thank God, is freedom, and no reasonable non-adherent can honestly say that he is compelled to believe in or do anything against his will or wishes by the presence of religious imagery or religious declarations on governmental seals, coins, or currency. Once again, Harris was not subject to any indirect coercion.

V.

The adjudication of this case on the merits will allow this Court to give significant guidance to lower courts in other lawsuits.

This Court has dealt with religious imagery on government property on prior occasions in an effort to draw a line between the permissible and impermissible for lower courts to follow. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court permitted a nativity scene which was part of a municipally owned holiday display containing other symbols, including Santa Claus. Likewise, in *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086 (1989), this Court allowed a Menorah to be displayed on the front steps of a City Hall with a Christmas tree and a sign saluting liberty, but prohibited a stand-alone creche from being placed on the staircase of the nearby County Courthouse. From these decisions, lower courts are aware that creches, nativity scenes, Menorahs and other religious symbols may be displayed during the Christmas holiday season, so long as they are accompanied by other symbols of a secular nature. They are not permitted to stand alone.

However, this Court has not ruled on cases involving religious imagery or religious declarations on government seals. It is important that this Court do so. The Great Seal of the United States contains the symbolic "eye of God" and many seals across this country contain small crosses similar to the cross on the City of Zion seal and the City of Rolling Meadows seal, which is also pending before this Court on a petition for certiorari, No. 91-141. A definitive ruling by this Court can save a good deal of judicial energy, attorneys' time and litigants' money regarding threatened challenges to other governmental displays containing religious symbols, such as crosses on the seals in Wauwatosa, Wisconsin, and Palatine, Illinois,

and the praying hands on the water tower in South Holland, Illinois.

Contrary to the Respondent's assertions, this case ties in very nicely with the questions presented in *Lee v. Weisman*, No. 90-1014, in which this Court has issued a writ of certiorari, and *Village of Crestwood v. John Doe*, No. 90-1573, wherein this Court has pending before it a petition for certiorari. Those cases involve a religious practice (junior high school graduation invocation and benediction to a deity) or a religious event (a Catholic mass in the Italian language) with an historical tradition. They involve both sectarian and non-sectarian issues, as does this case, wherein the cross is sectarian and the words, "God Reigns" are non-sectarian. This case will allow this Court to draw a distinction between sectarian and non-sectarian imagery, if such a distinction is deemed appropriate.

Respectfully submitted,

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